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# IN THE
# COURT OF APPEALS OF INDIANA

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| GREGORY G. DAVIS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 45A03-0712-CR-557 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0703-FB-29

**June 13, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

Gregory Davis appeals his sentence following his guilty plea to Intimidation, as a Class C felony, and Theft, as a Class D felony. Davis presents two issues for our review:

1. Whether the trial court abused its discretion when it sentenced him.

2. Whether the sentence imposed by the trial court was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On March 24, 2007, Gary Zar, the owner of Czar Automotive in Merrillville, noticed Davis standing at the counter of his business. Davis, with Zar's permission, used the restroom and exited the business. After Davis left, Zar realized that cash from his cash drawer was missing. Zar followed Davis outside and demanded that Davis return the cash, but Davis refused and threatened Zar with a knife. Law enforcement apprehended Davis and found the knife and the missing cash on Davis' person. The State charged Davis with Class B felony Robbery, Class C felony intimidation, Class D felony theft, and Class A misdemeanor Possession of Marijuana.

Pursuant to a plea agreement, Davis pleaded guilty to the intimidation and theft charges. In exchange, the State dismissed the other charges and agreed to refrain from filing an habitual offender enhancement against Davis. The plea agreement left sentencing open to the trial court's discretion, but the parties agreed that the sentences would run consecutively. In sentencing Davis, the trial court identified the following aggravators: his criminal history; his eligibility for habitual offender status; and his lack of remorse. And, the trial court identified Davis' admission of guilt as a mitigator. In

sentencing Davis, the trial court identified the following aggravators: his criminal history; his eligibility for habitual offender status; and his lack of remorse. And, the trial court identified Davis' admission of guilt as a mitigator. The trial court found that the aggravators outweighed the mitigators and sentenced Davis to seven years for the intimidation conviction and two and one-half years for the theft conviction, to be served consecutively.[1] The trial court also ordered Davis to participate in drug rehabilitation treatment while serving his sentence. This appeal ensued.

## DISCUSSION AND DECISION

### Issue One: Abuse of Discretion

Davis committed the present offense after the April 25, 2005, revisions to Indiana's sentencing scheme. Under the revised scheme, "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007) clarified in part on other grounds, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it (1) fails "to enter a sentencing statement at all[,]" (2) enters "a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons," (3) enters a sentencing statement that "omits reasons that are clearly

[1] There is a discrepancy between the oral sentencing order and the written sentencing order. The oral sentencing order states two and one-half years for the theft conviction, while the written sentencing order states two years for the theft conviction. The transcript of the sentencing hearing takes precedence over the judgment order. Marshall v. State, 621 N.E.2d 308, 323 (Ind. 1993).

supported by the record and advanced for consideration," or (4) considers reasons that "are improper as a matter of law." Id. at 490-91.

Davis contends that the trial court erred when it did not identify his continuing drug problem as a mitigating factor. In particular, Davis asserts that courts have recognized that drug addiction may be viewed as a mitigating factor. In support of that contention, Davis cites to Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002), trans. denied, where the trial court recognized the defendant's drug addiction as a mitigator. But, the trial court did not assign much weight to that factor. Id. at 1018.

It is well settled that the finding of mitigating circumstances is within the discretion of the trial court. Hackett v. State, 716 N.E.2d 1273, 1277 (Ind. 1999). The trial court is not obliged to explain why it did not find a factor to be significantly mitigating. Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001). Specifically, "[a]n allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." Anglemyer, 868 N.E.2d at 493.

Davis did not present significant mitigating evidence showing that his history of drug abuse warranted a reduced sentence. For instance, Davis did not argue to the trial court that he has sought treatment for drug and alcohol abuse prior to being arrested for the present offense.[2] And on appeal, Davis does not direct us to any evidence showing that the proffered mitigator is both significant and clearly supported by the record. The

[2] At the sentencing hearing, Davis stated only that he had "been taking classes" while he was in jail for the instant offense. Appellant's App. at 53.

trial court did not abuse its discretion when it refused to assign mitigating weight to Davis' drug abuse.

**Issue Two: Appellate Rule 7(B)**[3]

We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Davis must persuade the appellate court that his sentence has met this inappropriateness standard of review. See Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Davis contends that his nine-and-one-half-year aggregate sentence, which is in excess of the aggregate advisory sentence, is "manifestly unreasonable"[4] based upon the nature of the offense and his character. In particular, Davis asserts that a lesser sentence should be imposed because he had no intention of harming Zar and his conduct is excused by his substance abuse problem. We cannot agree.

First, the sentence is not inappropriate in light of the nature of the offense. We are not persuaded by Davis' "no harm, no foul" argument. Threatening a person with a knife is inherently dangerous, even if Davis did not actually harm or intend to harm Zar. Combining that factor with Davis' history of anger management problems and his refusal to return the money upon Zar's request, the sentence is appropriate in light of the nature of the offense.

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[3] Although Davis, in his issues presented, asks this court to review his sentence "in light of the nature of the offense and the character of the offender," he does not cite to Indiana Appellate Rule 7(B) in his argument. Nevertheless, we review this argument under Indiana Appellate Rule 7(B)'s inappropriateness standard of review. Anglemyer, 868 N.E.2d at 491.

[4] Davis' use of the "manifestly unreasonable" standard is incorrect and outdated.

Second, the sentence is not inappropriate in light of Davis' character. Davis has a lengthy criminal record dating back to his adolescence. Davis had two juvenile adjudications, and twelve misdemeanor convictions and eight felony convictions as an adult, which occurred in several states. As a juvenile, Davis was sentenced to the Indiana Boys School. Davis has since served community service, probation, and incarceration for his offenses. However, Davis continues to commit crimes.

Furthermore, Davis began abusing alcohol and marijuana at the age of fifteen. Davis also admits to using cocaine, beginning at age twenty-five. According to the pre-sentence investigation report, Davis last used marijuana and cocaine "before he got 'locked up' for the instant offense." (Pre-Sentence Investigation Report at 17). Yet, there is no indication that Davis has sought treatment for his drug problem prior to his arrest for the instant offenses.[5] The trial court ordered Davis to participate in drug rehabilitation treatment while serving his sentence. Given the nature of the offense and Davis' character, the nine-and-one-half year sentence coupled with the rehabilitation treatment is not inappropriate.

Affirmed.

DARDEN, J., and BROWN, J., concur.

[5] Again, the sentencing hearing and the pre-investigation report include vague statements regarding his attendance at chemical dependency classes, but those occurred during his most recent incarceration.